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In the Supreme Court of the United States

OCTOBER TERM, 1957

LAWRENCE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 17-21) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 6, 1957 (Pet. 17), and the petition for a writ of certiorari was filed on August 30, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence supports the trial court's finding of contempt for nonproduction of records.

STATEMENT

On May 21, 1957, the United States District Court for the Southern District of New York found petitioner guilty of contempt (R. 161) for failing to produce, pursuant to two grand jury subpoenas, certain records of a dissolved corporation of which he was the sole stockholder and president (R. 190-191). The contempt action was not based on petitioner's refusal to answer questions concerning the records before the grand jury but solely on his failure to produce what was specified in the subpoenas (R. 30-32, 44, 146, 159, 198-199). He was sentenced to imprisonment for sixty days "unless he shall purge himself of such contempt by producing the aforesaid books and records before this Court on or before May 27, 1957" (R. 161, 198-199). Upon his failure to produce the records, the court directed that his sentence should stand (R. 174). On appeal, the judgment was unanimously affirmed (Pet. 17-21).

The record may be summarized as follows:

In November, 1955, the grand jury began an investigation into charges that Brakes, Inc. had submitted false statements in connection with the performance of contracts with the government (R. 3). The corporation had gone out of business in October, 1954 (R. 97), and was legally dissolved on April 18, 1955 (R. 196). The business was taken over by Brake Center, Inc., at the same premises with petitioner still a "boss" (R. 76).

In November, 1955, a grand jury subpoena *duces tecum* directed to Brakes, Inc. (R. 184-185), was accepted by one Ilse Hammerstein, formerly head bookkeeper of the firm (R. 76-77), and an officer of Brake Center, Inc. (R. 76). This subpoena called for the production of certain records relating to the per-

formance of one of the corporation's government contracts (R. 184-185). Petitioner asked Mrs. Hammerstein "Are there any records" (R. 120). She gathered some together and turned them and the subpoena over to the corporation's attorneys (R. 78, 111). Some, but not all, of the records specified were produced.

On May 2, 1957, another grand jury, continuing the investigation, served petitioner with a second subpoena (R. 190) calling for the production of corporate records relating to twelve other government contracts (R. 186-187). On May 10, 1957, at the insistence of the grand jury foreman (R. 4, 6-7), petitioner produced copies of seven letters between Brakes, Inc., and the government (R. 4). On May 14, 1957, petitioner produced additional records called for in the two subpoenas after the grand jury foreman had specifically directed Mrs. Hammerstein to search for them (R. 88). A few more miscellaneous papers were produced on May 27, 1957, after petitioner had been adjudged in contempt (R. 4). The following records specified in the two subpoenas were not produced: copies of the contracts themselves; sales invoices; purchase orders; journals and invoices; certificates of compliance and analysis; records of shipments made pursuant to each contract; correspondence, account receivable and account payable ledger cards, and cash disbursements journal for the period between January, 1950, and December, 1951. When asked about the records by the grand jury, petitioner asserted that he had turned over all the records he could find and declined to answer other questions on the grounds of possible self-incrimination (R. 188-195).[1]

[1] During the contempt hearing, at which petitioner did not take the stand, the court stated: "I want to make it perfectly clear that I have no question whatever as to the position Mr. Johnson took as to any questions asked of him" (R. 159).

At the contempt hearing, Mrs. Hammerstein testified that Brakes, Inc., kept a general ledger, general journal, cash journal, a sales and purchase journal reflecting transactions with the government (R. 79), accounts receivable ledger cards (R. 113-114), and correspondence files relating to government contracts (R. 79-80, 91-92). She stated that, without exception, the corporate records were preserved for six or seven years (R. 85). Petitioner himself had testified before the grand jury that invoices were kept for at least six years (R. 134). Another employee of Brakes, Inc., until October, 1954, testified that the company had maintained a complete file on each government contract, and that these files contained copies of the contracts themselves, the certificates of compliance and analysis, and records of shipments made on the contracts (R. 57-58). He also stated that the corporation kept separate records of purchases made in connection with the performance of these contracts (R. 61). These documents, which had been subpoenaed, were not produced. These witnesses also testified that some records had been moved from one office to another (R. 77-80); that the opposing party to a civil suit in which Brakes, Inc., was involved had access to their files (R. 91-92, 106-109), but that it was believed that receipts were issued for returned files; and that two fires had occurred at the plant (R. 62-63, 70-71). No fire damage or loss of files was known to have resulted from any of these occurrences. Petitioner did not attempt to rely on these events related by government witnesses as an excuse for the non-production of the records. His counsel admitted at the conclusion of the hearing that "we have not offered any excuse for the unavailability of any of these records" (R. 131).

In finding petitioner guilty of contempt, the court was convinced beyond a reasonable doubt that the records existed when the subpoenas were served. He believed that the thorough and careful bookkeeping system calling for the keeping of corporate records for six years, as described by Mrs. Hammerstein, was inconsistent with the unexplained disappearance of substantial batches of records with respect to government transactions, and particularly with the disappearance of *all* the government invoices and contracts (R. 152-154). The court considered the ultimate production of certain sales journals called for under the first subpoena in 1955 but not produced until May, 1957, after continued prodding by the grand jury, "the most perfect proof that they existed when the subpoena was served" (R. 155). Commenting on the fact that there was no proof of any act that would cause the destruction or disappearances of the records, the court said that if any of the records had been destroyed by fire it was unbelievable that no suggestion had been made to that effect during the long course of the litigation (R. 157).

ARGUMENT

1. Petitioner's argument that his conviction was improper under the decision of this Court in *Curcio* v. *United States*, 354 U.S. 118 (Pet. 12-13), is clearly incorrect. In the *Curcio* case, this Court reaffirmed prior holdings that the books and records of corporations cannot be insulated from reasonable demands of governmental authorities by a claim of personal privilege on the part of the custodian, but held that a corporate custodian can lawfully invoke the Fifth Amendment with respect to questions seeking to ascertain the

whereabouts of books and records subpoenaed but not produced. In line with the *Curcio* case, the district court below specifically upheld petitioner's right to invoke the Fifth Amendment with respect to questions concerning the whereabouts of the records (R. 159; *supra*, pp. 2, 3). The adjudication of contempt was based solely on the refusal to produce the subpoenaed records (R. 30-32, 44, 146, 198-199; *supra*, pp. 2-3). The *Curcio* decision sustains the government here. This Court there noted (354 U.S. at p. 127, fn. 7) that "petitioner might have been proceeded against for his failure to produce the records demanded by the subpoena *duces tecum*." See also *Nilva* v. *United States*, 352 U. S. 385; *United States* v. *Fleischman*, 339 U.S. 349; *United States* v. *White*, 322 U.S. 694; *Wilson* v. *United States*, 221 U.S. 361.

2. Petitioner's other contentions go to the sufficiency of the evidence to support the conviction. He argues that there was an insufficient showing by the government of the existence of the records, and a sufficient showing, through the testimony of the government witnesses, of good faith compliance on his part. Both courts below properly found to the contrary.

The district court was fully justified in inferring from the facts proved that the records were still in existence at the time the subpoena was served. As the court pointed out, the careful bookkeeping system testified to by government witnesses negatived the likelihood that all records relating to government contracts had disappeared. The dissolution of the corporation was of no significance since, under Section 106(5) of the New York Stock Corporation Law, a director of a dissolved corporation remains responsible for the maintenance of corporate records until an order is entered

by the state court permitting destruction.[2] The move, fire, and litigation testified to by government witnesses were never claimed to have resulted in destruction of records. Petitioner never attempted to excuse nonproduction on such ground. In short, the court had the right to believe that carefully kept corporate records, which should have been retained, did in fact continue in existence up to the time the subpoena was served. Cf. *Lopiparo* v. *United States*, 216 F. 2d 87, 91 (C.A. 8), certiorari denied, 348 U.S. 916, where a corporate officer was held responsible for the unexplained nonproduction of corporate records even though the premises of the corporation had been padlocked. Here, nothing was shown to suggest that the records did not, as they would in normal course, continue to exist.[3]

The claim that petitioner's testimony to the grand jury that he produced the records he could find showed good faith compliance, is fully answered by the recent decision of this Court in *Nilva* v. *United States*, 352 U.S. 385, 395:

> Petitioner contends that his testimony that he attempted, in good faith, to comply with the subpoenas disproves the existence of any wilful default, and presents an "adequate excuse" for his

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[2] It is well established that the fact of dissolution does not change the duty of the custodian to produce corporate records. See *Grant* v. *United States*, 227 U.S. 74; *Wheeler* v. *United States*, 226 U.S. 478. Under Section 105(8) of the New York Stock Corporation Law, upon the voluntary dissolution of a New York corporation, the corporate entity continues to exist for the purpose of discharging its existing liabilities and obligations and it may continue to sue and be sued in its corporate name.

[3] In *United States* v. *Patterson*, 219 F. 2d 659 (Pet. 21), Patterson's possession of the records had been interrupted by service of a jail sentence, and other persons, who had access to the records, had an incentive to destroy the subpoenaed records.

> failure to comply under Rule 17(g), Federal Rules of Criminal Procedure. However, his protestations of good faith were subject to appraisal by the court that heard them. It was the judge of his credibility and of the weight to be given to his testimony. Lopiparo v. United States, 216 F. 2d 87, 91 [certiorari denied, 348 U.S. 916]. In our view, the trial court had sufficient basis for concluding that petitioner intentionally, and without "adequate excuse," defied the court.

Petitioner's attorney himself stated that no excuse was offered for non-production (R. 131).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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